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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 838

DANIEL SORANNO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

DANIEL SORANNO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Eastern District of California, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages ..... It is also set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals was entered on October 15, 1968 (denial of petition for rehearing) [R. ...]*; also see Appendix B to this petition. This petition for Writ of Certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED

The sole questions presented are:

1. Whether a Selective Service System registrant, presenting a prima facie claim for a conscientious objector classification, and was so classified, but, was thereafter reclassified I-A (the only intervening fact being that he appealed for a student classification) is entitled to defend a prosecution for failure to submit to induction on the basis that he was misclassified contrary to all the evidence before the board, where he did not report for induction, as ordered.

2. Whether his excuse for failing to go to the Entrance Station, for induction, is legally sufficient.

*R. refers to the Record of Proceedings in the Court of Appeals.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.). They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training Service Act, 50 U.S.C. App. § 462 [TR. 2]*; that he became a registrant of Local Board No. 55 of the Selective Service System, State of California and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 55 to report for and submit to induction into the armed services of the United States [TR. 1].

Petitioner pleaded not guilty, waived jury trial and was tried on October 30, 1967 [TR. 6]. A written motion for judgment of acquittal was filed [TR. 3]. The motion was denied and the petitioner was found guilty on October 30, 1967, and thereafter was sentenced and admitted to bail pending appeal [TR. 6].

6. THE FACTS

Petitioner registered with Local Board No. 55 on May 19, 1960.

While classified as a student he filed the Special Form for Conscientious Objector on September 30, 1964 [EX. 12]** but was continued in a student classification, this

*TR. refers to the Transcript of Record (trial level).

**EX. refers to the Government's Exhibit, the selective service file of appellant. The pagination is ordinarily pencilled at the bottom of each sheet of the exhibit.

action conforming to applicable law, the student classification being "lower" than either of the two conscientious objector classifications.

After he was reclassified into Class I-A (September 15, 1965) [EX. 12] he was reclassified into Class I-O (October 15, 1965) [EX. 12].

He then wrote he wanted to finish his schooling and sent in an appeal for a student's classification. He was promptly reclassified into Class I-A [EX. 12].

He appealed but was kept in Class I-A by the Appeal Board [EX. 13, 63].

Shortly thereafter he was ordered to report for induction. He failed to report, twice, giving the same excuse each time: that his nose had been operated on; that the first operation was faulty and required a reoperation; that at the times of his orders to report for induction (1) his nose was in an extremely vulnerable condition to a blow; (2) that he feared being struck on the nose; (3) that he had reasons to fear being struck on the nose in that it was common knowledge that, at all times concerned, the Oakland Induction Station was subject to violence by protestors, police and selectees [EX. 30, 40, 41, 57 and R.T. 43, 95].

7. REASONS FOR GRANTING WRIT

The sole questions raised by the petitioner call for a definitive answer to the oft-raised questions:

1. Is a Selective Service System registrant entitled to a defense in court, on a claim of an arbitrary ignoring of an unrebutted prima facie case for a conscientious objector classification, despite the fact he did not report at the induction station?

2. Are there excuses, and is petitioner's a good one for non-appearance at the induction station?

The questions are of national import because thousands of registrants are in the predicament of petitioner: they are young and inexperienced, and are given wholly insufficient warning or information on the subject of how to help themselves get ready for a court contest.

ARGUMENT

I

The Court of Appeals' opinion says (page one): "Appellant also raises the question of whether he should not have been classified as a conscientious objector. This he cannot raise on this appeal, for he had himself objected to his I-O (or conscientious objector classification) before his I-A classification."

The factual basis for the above conclusion is, in reality, a misreading of defendant's Selective Service file. A correct reading shows the following:

1. He filed his conscientious objector claim and he *was* given a I-O [EX. 12].

2. Since he was desirous of finishing his education he quickly said so in a letter and asked for II-S; he also "appealed" [EX. 63].

3. The board, at this point, did not honor his appeal. The board's prompt reaction, giving him a I-A, was an outrageous act. There was not only no factual basis for a change, but when it *then* sent his file to the Appeal Board his appeal was unfairly prejudiced: it was in a less favorable odor in that he was before the Appeal Board as a rejected claimant for a conscientious objector classifica-

tion, a registrant impliedly branded a sham; he should have been before them as a I-O, a registrant impliedly found truthful, conscientious objection being a subjective matter.

The law is clear that registrants are required to promptly notify the board of a change of status, 32 C.F.R. § 1623.1; the law is clear that the system is to classify every registrant in the "lowest" class which his valid evidence presents, 32 C.F.R. § 1623.2.

Therefore, it was his duty to report that he was back in college and it was the board's duty to reclassify him from I-O to II-S.

So much for the merits of his case.

II

Next, the validity of his excuse.

The opinion [page two] says, "Nor is appellant's fear he would be 'socked' in the nose a sufficient excuse for him to fail to go 'to the brink' of induction."

This conclusion (a repetition of the similar comment on page one) overlooks 1) the clear, and undisputed facts relating to the precise condition of the nose: that it was in a fragile condition, and that he was in the middle of a series of required operations, and 2) that there was an unruly atmosphere at the Oakland Examining and Induction Station, some conduct there being of a violent nature, at all times concerned.

It is submitted that such an excuse is legally sufficient; that neither the exigencies of the times nor administrative convenience forbad the reordering of this man at a later time.

Donato v. *United States,* 9 Cir., 1962, 302 F.2d 468.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

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Attorney for Petitioner

December 14, 1968.

APPENDIX

APPENDIX A

TRANSCRIPT OF RECORD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

TWO VOLUMES

No. .....

DANIEL SORANNO,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

VOLUME ONE

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Proceedings had in Court of Appeals
in this volume

United States Court of Appeals

FOR THE NINTH CIIRCUIT

DANIEL SORANNO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 22587

Appeal from the United States District Court
for the Eastern District of California

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals

FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, August 5, 1968

Before: JOHNSEN, BARNES and DUNIWAY, Circuit Judges

Order of Submission

This cause coming on for hearing, J. B. Tietz argued for the appellant, and James J. Simonelli argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

United States Court of Appeals

FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, September 16, 1968

Before: JOHNSEN, BARNES and DUNIWAY, Circuit Judges

Order Directing Filing of Opinion and Filing and Recording of Judgment

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL SORANNO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 22,587

[September 16, 1968]

Appeal from the United States District Court for the Eastern District of California

Before: *JOHNSEN, BARNES and DUNIWAY, Circuit Judges

PER CURIAM:

Appellant was indicted and found guilty of failing to report for induction into the military service of the United

*Hon. Harvey M. Johnsen, Senior Judge, U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

States (50 U.S.C. Appendix § 462) after he had been classified I-A; had appealed; his appeal had been denied; and he had been ordered to report. The reason given for his failure to report was that his nose had been operated upon, and he feared he would be "socked" on the nose at the induction center.

Jurisdiction below existed under 18 U.S.C. § 3231, and exists here under former Rule 37(a)(1) and (2), Fed. R. Crim. P.

Appellant also raises the question of whether he should not have been classified as a conscientious objector. This he cannot raise on this appeal, for he had himself objected to his I-O (or conscientious objector classification) before his I-A classification. He failed to go to the brink of induction—or even so far as to report for a physical examination; or to report on a second request after a first refusal to report. The propriety of the classification is thus not open to appellant's attack. "[T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in registrant's status resulting from circumstances over which the registrant had no control." 32 C.F.R. § 1625.2, Selective Service Regulations. *Falbo* v. *United States*, 320 U.S. 549 (1944); *Moore* v. *United States*, 302 F.2d 929, 930 (9th Cir. 1962). *Cf. Billings* v. *Truesdell*, 321 U.S. 542 (1944); *Estep* v. *United States*, 327 U.S. 114 (1946); *Daniels* v. *United States*, 372 F.2d 407, 413.

Nor is appellant's fear he would be "socked" in the nose a sufficient excuse for him to fail to go "to the brink" of induction. *Compare Donato* v. *United States*, 302 F.2d 468 (9th Cir. 1962) with *Prohoroff* v. *Evans*, 259 F.2d 694 (9th Cir. 1958) and *Evans* v. *United States*, 252 F.2d 509 (9th Cir. 1958).

AFFIRMED.

Judgment

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL SORANNO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 22587

Appeal from the United States District Court
for the Eastern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 16, 1968.

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIIT

Excerpt from Proceedings of Tuesday, October 15, 1968

Before: JOHNSEN, BARNES and DUNIWAY, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed October 15, 1968 and within time allowed therefor, and valid extension thereof, by rule of court, for a rehearing of above cause be, and hereby is denied.

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL SORANNO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 22587

Certificate of Clerk, United States Court of Appeals for the Ninth Circuit, to Record Certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

I, WILLIAM B. LUCK, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify this transcript of record in two volumes to be a full, true and correct copy of the entire record of the above entitled cause in the said Court of Appeals, made pursuant to the request of counsel for the appellant Soranno, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

ATTEST my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of November, 1968.

WILLIAM B. LUCK, Clerk

APPENDIX C

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Universal Military Training and Service Act of 1951, As Amended (50 U.S.C.A. App. § 456 (j)).

(j) Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of relgious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period—equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person

who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The

appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 838

DANIEL SORANNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 401 F. 2d 534.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1968. A petition for rehearing was denied on October 15, 1968. Mr. Justice Douglas extended the time to file a petition for a writ of cer-

tiorari to December 14, 1968 and the petition was filed on December 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who failed to obey an order to report for induction, may defend against a criminal prosecution for failure to submit to induction on the ground that he was wrongfully classified I-A in violation of the Selective Service Act.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of California, petitioner was convicted of willfully and knowingly failing to report for and submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462. On October 30, 1967, he was sentenced to imprisonment for a period of three years.

The facts of the case are not in dispute. Petitioner, who was born on November 15, 1940, first registered with his local Selective Service Board on May 19, 1960 (S.S. File 2, 4).[1] On August 23, 1961, petitioner was classified I-A (S.S. File 12). He did not appeal that classification. On October 18, 1963, following a physical examination, petitioner was ordered to report for induction on November 12, 1963 (S.S. File 12, 119). On October 24, 1963, an order postponing petitioner's induction was entered and on October 30,

[1] We are lodging a copy of petitioner's Selective Service File with the Clerk of the Court.

1963 petitioner was classified I-S (S.S. File 12). On September 20, 1964, petitioner wrote that he had become a member of Jehovah's Witnesses and requested a form for claiming conscientious objection which was mailed to him. Petitioner completed it and returned it to his local board. On October 28, 1964, he was classified II-S (S.S. File 12, 40).

On September 15, 1965, petitioner was reclassified I-A but on October 16, 1965, he was reclassified I-O, the classification for conscientious objectors (S.S. File 12). On October 26, 1965, petitioner asked the board to consider his request for a student deferment and notified it that he desired to appeal his I-O classification (S.S. File 63). On November 10, 1965, the local board reclassified him I-A (S.S. File 12). On November 21, 1965, petitioner notified his local board that he was exercising his right to appeal that classification to the appeal board on the ground that he was entitled to either a student deferment or conscientious objector classification (S.S. File 65). In accordance with the procedure then provided by Section 6(j), 50 U.S.C. App. 456(j), of the Universal Military Training and Service Act, the appeal board referred the case to the Department of Justice for an advisory opinion with respect to petitioner's conscientious objector claim (S.S. File 68). On September 7, 1966, the Department of Justice recommended that petitioner's conscientious objector claim not be sustained on the ground that there was doubt as to the existence of the deep and sincere religious belief necessary to sustain such a claim (S.S. File 72-75). On October 12, 1966, petitioner was classified I-A by the appeal board (S.S. File 13, 101).

On October 18, 1966, petitioner was ordered to report for induction on November 3, 1966 (S.S. File 13, 103). Petitioner failed to report for induction on that date (S.S. File 13). After consulting an attorney, petitioner, on November 15, 1966, wrote to his draft board requesting that he be reordered to report for induction so that he could report and, if found physically fit for service, he could then refuse to submit for induction and thus assure his right to assert the defense of misclassification in a criminal prosecution for failing to submit to induction (S.S. File 115-116). On February 3, 1967, the local board informed petitioner that he was under a continuing duty to report for induction; and ordered him to report on February 9, 1967. (S.S. File 13, 130). Pursuant to petitioner's request his induction order was transferred to Sacramento and he was ordered to report on March 8, 1967 (S.S. File 13, 133). However, petitioner again failed to report for induction (S.S. File 13). At his trial petitioner contended that his failure to report for induction should be excused because his nose had been recently operated on and he was afraid of being struck on the nose if he reported to the induction center which had been the scene of violence by protestors, police and draftees (R. 75, 94, 95).

ARGUMENT

As both courts below concluded, petitioner is precluded from attacking his classification in this criminal prosecution for failing to report for induction because he failed to complete the administrative process.

Although, at his request, he was given a second chance to report for induction, he failed to do so. In *Falbo* v. *United States*, 320 U.S. 549, 553, this Court noted that a registrant who has exhausted his administrative appeals may still be rejected for service at the physical examination at the induction center prior to actual induction. Consequently this Court held that a registrant who failed to report to the induction center for such a physical examination had not completed the administrative process and could not assert the defense of misclassification in a prosecution for failing to report for induction. See also *Gibson* v. *United States*, 329 U.S. 338, 343-345. The rationale underlying the *Falbo* doctrine has been explained as being that "even after administrative remedies have been exhausted, a court will not examine the validity of a classification until the registrant establishes that he has been aggrieved. A registrant is aggrieved only when the selection process is at an end and there is no longer a possibility of rejection as a part of that process". *Daniels* v. *United States*, 372 F. 2d 407, 414 (C.A. 9, *en banc*). See, the government's brief in *McKart* v. *United States*, No. 403 this Term, certiorari granted October 28, 1968, pp. 25-29. Here petitioner would have been given a complete physical examination at the induction center. Army Reg. 601-270. As the court said in *United States* v. *Irons*, 369 F. 2d 557, 558 (C.A. 6):

> Even if improperly classified I-A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as 4-F. Where this

is the result, all constitutional and other problems incident to I-A classification disappear of course, *eo instanti.*

Petitioner attempts to excuse his failure to report to the induction center on the ground that he was afraid of being hit on his nose which had recently been operated on. However, as the court below concluded, this excuse for failing "to go to the brink of induction" is insufficient. Petitioner himself asked for the second chance to report and requested that the order to report be transferred to Sacramento. This case differs from *Donato* v. *United States*, 302 F. 2d 468, relied upon by petitioner, in which the court excused a failure to appeal a selective service classification because the defendant had been summoned to firefighting duty during the time specified for an appeal from the classification decision and the appeal period had expired when he returned from the firefighting mission. Here, implicit in the trial court's finding that petitioner had wilfully failed to report for induction, was a rejection of petitioner's testimony that his failure to report for induction resulted from his fear of injury.[2]

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[2] Although, under these circumstances, we do not have to reach the question of the correctness of petitioner's classification, an examination of petitioner's file discloses that there was ample basis in fact for the appeal board's denial of conscientious objector status to petitioner (S.S. File 72-81). The fact that petitioner did not claim conscientious objector status until he was found physically fit for armed service and the complaints of his coreligionists that petitioner had decreased his religious participation support this determination.

Similarly, petitioner's claim that his local board arbitrarily changed his classification from I-O to I-A when he requested

Since the validity of the exhaustion of administrative remedies doctrine is now pending before the Court in *McKart* v. *United States*, No. 403 this Term, and, *DuVernay* v. *United States*, No. 814 this Term, the Court may wish to defer action on this petition until it decides those cases.

Respectfully submitted.

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Solicitor General.

WILL WILSON,
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BEATRICE ROSENBERG,
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Attorneys.

FEBRUARY 1969

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a student deferment must be rejected. The board may well have reexamined the file and concluded that it had been wrong the first time. In any event, the classification was reexamined *de novo* by the appeal board when petitioner appealed. The action of the appeal board completely supersedes the action of the local board and any defects in the local board action are cured. *Tomlimson* v. *United States*, 216 F. 2d 12, 16 (C.A. 9), certiorari denied, 348 U.S. 970; *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8).

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SORANNO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 838. Decided June 9, 1969.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States District Court for the Eastern District of California for further consideration in light of *McKart* v. *United States*, 395 U. S. —, decided May 26, 1969.